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JOHANNES MEHSERLE

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

WILEY M. MANUEL COURTHOUSE

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, v. **JOHANNES MEHSERLE** Defendant.	Case Number: 161210 **DEFENDANT JOHANNES MEHSERLE'S REPLY TO THE DISTRICT ATTORNEY'S OPPOSITION TO DEFENDANT'S COMBINED MOTION PURSUANT TO PENAL CODE §995 AND NON-STATUTORY MOTION TO DISMISS**

INTRODUCTION

The point of allowing the parties to a dispute to brief legal issues in advance of a hearing on a substantive motion—and in particular on a motion that may be dispositive—is to assist the Court. In light of that obligation, and given that this first California prosecution of a police officer for an on-duty homicide has garnered unprecedented attention from the community and the media, and given that a young former police officer with no history of violence or misconduct of any sort faces a life sentence, one might expect the District Attorney

to face the important questions raised by Mehserle's combined statutory and non-statutory motion to dismiss.

Instead, following a twenty-page discussion of the evidence and general legal principles the District Attorney's opposition simply offers a few short paragraphs saying—without much explaining—that the motion should be denied and that Mehserle should stand trial for murder.

The prosecution's slapdash approach to its briefing is problematic in two ways.

First, it offers this Court no assistance in addressing the questions posed by the motion. This case is *sui generis*. The legal issues before the Court now, and those that will inevitably arise throughout this litigation, are thorny and will be reviewed by the Court of Appeal, the state Supreme Court, and perhaps by the federal courts. If California intends to send a police officer to prison for the rest of his life for an on-duty shooting that occurred during the arrest of a resisting suspect, it had better ensure that such a prosecution is squeaky clean. It is surprising in that context to see briefing by the District Attorney that ignores serious claims of legal error committed by the Magistrate who presided over the preliminary hearing.

Second, and perhaps more importantly, such briefing sends precisely the wrong message to a restive community paying close attention. From just hours after the Grant shooting, members of the media, community and religious leaders, and politicians, have been calling for Mehserle's conviction of murder. They—and those who resorted to civil unrest during the weeks after the Grant shooting—have little understanding of the important and precedent-setting legal issues raised by the case. They have no sense that the decisions made here will have a profound impact on the administration of justice in this state going forward. As to this case, at least, they appear to be unconcerned with the rule of law.

In a matter of such extraordinary seriousness and importance, and which has caused such upset in the community, it is the DA's job, beyond all others, to insist that the rule of law prevail over sentiment and outrage. As the United States Supreme Court said 75 years ago, the prosecutor's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that

justice shall be done." *Berger v. United States* (1935) 295 U.S. 78, 88. But by refusing in almost all instances to directly address defendant's legal arguments and claims of error, the DA sends precisely the opposite message: justice be damned; we just want to win the case, give the community what it demands, and move on.

Defendant urges this Court carefully to consider Mehserle's arguments. If it does so without regard to community sentiment, it will have no choice under the prevailing law but to reject the magistrate's holding order.

I. THE MAGISTRATE IMPROPERLY SHIFTED THE BURDEN OF PROOF

In his motion, Mehserle argued at considerable length that as to the issues of accident and imperfect self-defense the magistrate improperly shifted the burden of proof to Mehserle. The prosecution never mentions the issue. Defendant will therefore rely on his prior briefing.

One point of clarification is in order.

In its brief, the prosecution cites various cases for the unremarkable and well-settled proposition that a defendant has the obligation to raise facts which suggest the existence of an affirmative defense—whether at a preliminary hearing or at trial—and that under longstanding principles of federal due process, the prosecution has the ultimate burden of proving (beyond a reasonable doubt at trial; by probable cause at the preliminary hearing) the absence of such a defense. (Opposition at 17-18)

The DA then extends this rule beyond its breaking point, misleading this Court about the state of the law. It says this: "To prevail in a motion under section 995 on the basis of an affirmative defense the defendant must show 'in light of the evidence presented to the magistrate' that the affirmative defense negates the magistrate's probable cause to believe in defendant's guilt." (Opposition at 18, quoting *People v. Mower* (2002) 28 Cal.4th 457, 473.

The assertion is not only misleading as to the proper assignment of burdens at a preliminary hearing, it's nonsensical, and this Court should note that the brief quote taken from *Mower* does not contain the gist of the DA's argument.

An affirmative defense does not "negate a magistrate's probable cause belief in the defendant's guilt" as the DA seems to argue. As due process requires, facts which raise an affirmative defense—whether at prelim or at trial—require the state to offer sufficient evidence to demonstrate an absence of the affirmative defense. In other words, if such facts exist and are not disproven by the prosecution, no probable cause exists in the first place.

Neither the page of *Mower* cited by the DA, nor any other part of *Mower*, nor any other case, is to the contrary.

II. THERE IS INSUFFICIENT EVIDENCE OF MALICE TO SUPPORT A MURDER CHARGE

A. Did The Prosecution Prove That Mehserle Decided To Shoot Grant, Knowingly And Intentionally Pulled His Gun, and Then Knowingly And Intentionally Shot Grant With the Gun?

1. Defendant's Argument

The prosecution's position on the malice question is this: Mehserle shot the unarmed Oscar Grant in the back and that's enough for him to be held to answer for murder. If this case involved a "civilian" charged with the crime, the DA might well be right. But because the shooter was a sworn law enforcement officer, and because the circumstances were volatile, and because Mehserle was on the scene for an extraordinarily short time, before we subject him to the jeopardy of a full-blown criminal trial, contrary to the DA's wishes, it is incumbent upon this Court to look a little more closely.

As Mehserle has argued, aside from the bare fact of the shooting, the prosecution offered not a scintilla of evidence that Mehserle intended to shoot, rather than to tase, Oscar Grant. More importantly, of course, there was overwhelming evidence in the form of still frame photographs taken from the videos and witness testimony (including testimony regarding statements made by Mehserle in the moments before the shooting), that Mehserle intended to use his taser and not his firearm.

As noted, Mehserle was on the platform just over two minutes. He had been involved in none of the prior conflict on the platform that might have inspired malice regarding the detainees. Mehserle used no epithets or racial slurs. Mehserle has no history of misconduct or violence. Grant's hands were under his body and Mehserle told his partner that he could not get the detainee's hands. Why would Mehserle have said such a thing if it were not true?

Indeed, the video introduced by the defense (Exhibit "G") showed that Grant's arm was moving, that he was trying to get up, that his right and then his left shoulder was coming off the ground—all of which supplied absolutely justifiable grounds to tase Grant, and were consistent with Mehserle's subsequent conduct. Mehserle told Pirone to get up (and away from where he intended to fire the Taser darts), just as he had been trained to do. Mehserle then stood up, backed up slightly, and went for his Taser, just as he had been trained to do. As the stills taken from the videos make unambiguously clear, Mehserle used his Taser withdrawal technique on the gun holster, and for a time, unsurprisingly, failed to get the gun. He fought to remove the weapon, hoisting his utility belt halfway upward in the process. Finally the gun came free, and he fired it.

Likewise, Mehserle's conduct following the shooting was entirely consistent with a person who never intended to fire his weapon, and entirely inconsistent with an intent to shoot Grant: according to every witness, police and civilian, Mehserle acted like a person who was utterly shocked and surprised by what had just occurred, and who acted like a person who had just been involved in a terrible, tragic accident.

Finally, at the close of his discussion on this point, Mehserle pointed out that while the magistrate made clear his view that the officer intended to pull his gun and not his taser, that conclusion was based on two unambiguously erroneous conclusions of fact.

First, the magistrate relied on the fact that Mehserle used both hands on the weapon and from that concluded that he could not have therefore mistaken it for a Taser. (PHT 1061) But had the magistrate not improperly excluded the defense taser expert, he would have learned that

Taser users are trained to do precisely that: put both hands on the weapon while firing, just like a gun. Indeed, film of Mehserle's Taser training class shows Mehserle being tased by another officer who, critically, has both hands on the Taser.

Second, the magistrate concluded because Mehserle used his strong hand to remove his gun he could not have intended to pull his taser. But again, the magistrate simply misunderstood the facts. The evidence was clear that while some officers use a weak hand draw to remove the taser, (a) BART does not require such a holster set up; (b) not all BART officers carried the Taser to employ a weak hand draw; and (c) many officers carried the Taser so that it could be drawn with the strong hand. And, of course, had the magistrate heard from defendant's taser expert, it would have learned that Mehserle had been trained that he could use either a strong hand or weak hand draw.

2. The Prosecution's Answer

In response, unsurprisingly, the state begins with a straw man. It argues at some length that the Court should reject Mehserle's argument that Grant's homicide was justifiable. (Opposition at 19) While Mehserle certainly reserves the right to take that view at trial, this Court will not find such an argument in his motion.

When the DA finally turns to the real question presented, it simply ignores the foregoing points, relying instead on conclusory statements like "there is no evidence the defendant's shooting of the victim was accidental" and "there is no possible scenario in which the shooting could be accidental . . . ." (Opposition at 19) Such statements are singularly unhelpful to this Court in resolving the important question presented—given the powerful evidence that Mehserle intended to tase Grant, did the officer actually form the malice required to put him through a murder trial?

Substantively, the DA makes these points. First, it says Mehserle shot Grant with two hands. (Opposition at 19) It is true that the shot was fired just as Mehserle's right and left hands came together. It is also true that, as Mehserle has discussed, and as Mehserle's expert would

have told the magistrate had he been permitted to appear, using two-hands to fire a taser is proper. The DA never addresses the point.

Next, the DA says Mehserle could not have intended to use his taser because "the process of unholstering a firearm is different than the process of unholstering a taser." (Opposition at 20) It is almost as if the DA never bothered to read Mehserle's brief. Mehserle made precisely this point; the fact weighs heavily *against* any conclusion that the officer intended to pull his firearm. As noted, the photographs show Mehserle used (unsuccessfully for a time) the taser release move on his firearm, which is conclusive evidence that at the critical moment he decided to use his taser (just as he said he would do) and intended to use his taser.

Next the DA says the "Taser is to be fired from the off hand; defendant fired with both hands." (Opposition at 20) This assertion is stunning. It is unsupported by a citation to the record because no such fact appears in the record. And, as Mehserle has argued—an argument the prosecution assiduously avoids answering—had the magistrate permitted defendant's taser expert to testify, that expert would have informed the court (and the DA) (a) that the taser may be fired with the strong hand and (b) that the taser is *supposed* to be fired with a two hand hold.

The DA concludes its argument by asserting that even if it failed to prove malice—in other words, that Mehserle intended to pull his gun and not his taser—that would not absolve the defendant of criminal liability. (Opposition at 20) That statement is entirely correct. But as the DA well knows—although it fails to make the point in its brief—in such a circumstance the existing holding order would be invalid. In that circumstance Mehserle would face at most a charge for involuntary manslaughter.

In possession of woefully unconvincing evidence that Mehserle intentionally shot Oscar Grant, faced with overwhelming evidence that Mehserle *did not* intend to use his firearm, and in light of two critical factual errors by the magistrate in its malice analysis—i.e., the two hand hold and strong hand draw— the DA ignores the real issues, offers this Court conclusory statements of its position, and presents argument that either is unambiguously contradicted by

the record or actually supports defendant's position. It has fallen far short of its obligation to supply the proof required to compel the defendant to stand trial for murder.

B. Did the Prosecution Prove that Mehserle Did Not Actually (Even if Unreasonably) Believe That He Was Justified In Shooting Grant

Even if the DA is correct that it has supplied probable cause to believe that Mehserle intended to use his gun rather than his taser, it still cannot compel Mehserle to stand trial for murder unless it provides adequate proof that the officer did not actually believe he had a right to use lethal force. If he had such a belief, the most Mehserle could stand trial for would be voluntary manslaughter.

As Mehserle set forth in detail in his motion, the DA's problem on this issue is that the magistrate himself found as a factual matter—a ruling this Court is bound to accept—that the officers on the BART platform that night actually and honestly believed that their lives were in danger. In his discussion of the evidence, the magistrate noted that Woffinden and Mehserle had been at the West Oakland station and had pulled a gun off a suspect. (PHT 1060) Before that there was an incident in San Francisco involving a gun. (PHT 1060)

The magistrate noted that "[Woffinden's] state of mind was in an elevated state as he and the defendant traveled to Fruitvale and . . . their adrenaline was rushing and . . . scared thoughts were going through his mind as well as his thoughts of family and his wife and kids." (PHT 1060) "Their state of mind leaving West Oakland to Fruitvale was arriving in general uncertainty. Woffinden, Pirone, Knudtson and Domenici, they all talk about it. They all talk about it. They were aware of these other incidents with guns, and their state was elevated. And Woffinden says, you know, when they get there at the scene, it was extremely noisy, they were being taunted; it was chaotic; there was no respect for the group. . . . All these officers talked about there were so many threats and there was a fear for their safety." (PHT 1060)

Finally, and most critically, the magistrate ruled that Officer Pirone was credible when he testified that, "Mr. Grant posed an imminent threat of death to them." (PHT 1061)

Like this Court, the DA must accept these factual findings. How then can it logically argue that when he pulled his gun, Mehserle, like his co-officers, did *not* actually believe that he had the right to use lethal force?

The answer, of course, is that it can't. And, unsurprisingly, it doesn't even try. In its paragraph-long response, it ignores Mehserle's argument regarding the magistrate's factual findings, ignores the factual findings themselves, and ignores the law which makes clear that such factual findings are binding on the parties and any reviewing court. *See, e.g., People v. Topp* (1974) 40 Cal.App.3d 372, 375 (in a 995 proceeding, the Superior Court is bound by the magistrate's factual findings).

Rather, the DA asserts that there is no evidence Mehserle believed he had the right to use lethal force (Opposition at 20), while failing to alert this Court to any of the evidence that convinced the magistrate of the contrary.

This Court not only should not, it must not revisit the question of whether the officers on the BART platform that night actually and honestly believed their lives were in danger. It must not revisit the question whether Pirone—who was standing inches from Mehserle, and who was engaged with Mehserle in the same attempted arrest—actually and honestly believed that Grant posed an "imminent threat of death" to *both* officers. In both instances, the magistrate made factual findings that this Court must accept.

The only issue here is whether there is anything in the record to suggest that, unlike the other officers, including Pirone, Mehserle *did not* share the actual and honest belief that Grant posed such a threat that he was entitled to employ lethal force. The record contains no such proof and, of course, the DA points to none in its brief. In that case, at a minimum, the holding order must be vacated and the pending charge reduced to voluntary manslaughter.

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III. THE MAGISTRATE PREJUDICIALLY DENIED MEHSERLE'S SUBSTANTIAL RIGHTS BY BLOCKING THE ADMISSION OF CRITICAL DEFENSE EVIDENCE

In his motion, Mehserle set forth various ways in which the magistrate, contrary to the defendant's state and constitutional right to due process of law and his right to present a full defense, precluded the introduction of key defense evidence. For the most part those issues have been adequately briefed, and in view of the state's insubstantial rejoinder, there is little need for further briefing.

For example, the magistrate precluded obviously admissible evidence of Grant's character for violence. The DA doesn't even attempt to defend the magistrate's basis for excluding the evidence—that the evidence was inadmissible unless Mehserle took the stand. Rather, the prosecution now says the lower court's ruling was "*consistent with* [Evidence Code] section 352." (Opposition at 22)(emphasis added)

Had such a §352 ruling occurred it would be entitled to deference by this Court. But no such ruling exists because the magistrate did not believe, and never said, the character evidence was cumulative or more prejudicial than probative or was a waste of time. Rather, the magistrate erroneously believed the evidence was inadmissible unless Mehserle took the stand. The ruling is doubly troubling because during the preliminary hearing, Mehserle placed before the court briefing (unanswered by the DA) that demonstrated the court's ruling was contrary to decades of California jurisprudence. In any case, the error and prejudice as to the character evidence and the various other claims asserted in Mehserle's motion ought to be clear by now.

But one ruling by the magistrate was so obviously erroneous and so extraordinarily prejudicial that it merits further attention. In his motion, Mehserle argued that the magistrate improperly refused to hear from an expert on the training and deployment of tasers. Given that the central factual question in this precedent-setting litigation is whether Mehserle intended to pull his taser rather than his gun; and given the powerful evidence in the record that Mehserle, in fact, intended to pull his taser and not his gun; and given that Mehserle's taser training had

occurred just weeks before the shooting and was itself very brief—given all that, one might imagine the magistrate would be anxious to hear from an expert on taser training and use.

By the time the issue of the taser training/use expert arose, of course, the magistrate had made it clear to the parties that he intended to end the preliminary hearing forthwith. Given the seriousness of the charges and the *sui generis* nature of the case, it is hard to understand why the court was suddenly in such a rush. One possible answer may be found in the court's off-the-record statements to counsel: the magistrate had received pressure from others around the courthouse to preclude Mehserle from presenting any witnesses at all.

Counsel told the magistrate that the expert would testify as to the following subjects: (1) in general on the subject of proper taser training and deployment, including the subjects of proper draws and proper holds when firing the taser; (2) the inadequacy of Mehserle's taser training (which, of course, logically includes the subject of Mehserle's unholstering of the taser); (3) the inadequacy of the period between the training and Mehserle's attempted use of the taser on the night of the Grant shooting; and (4) the effect of repetition on the use of motor skills in unholstering weapons—the point being, of course, that a person who has unholstered a weapon thousands of times can do it effortlessly, while a person (like Mehserle) who had unholstered his taser only a few times, might make a mistake in attempting to do so and by reference to the video (which includes the critical shots of Mehserle attempting to use the taser unholstering method on his service weapon, and the shot of Mehserle pulling his utility belt halfway up his body in his initially unsuccessful effort to use the taser unholstering method on his gun), the expert intended to opine that Mehserle appeared to be attempting to deploy his taser and not his gun moments before the shooting and thus that the drawing of the service weapon was an accident.

The magistrate's ruling excluding the evidence breaks new and extraordinary ground in California expert law. It held that because the taser expert was not there, he could not tell the court what happened. (PHT 922) When counsel pointed out that few experts are percipient

witnesses and that they are regularly permitted to offer opinions regarding a complex set of events, this was the magistrate's reply: "He's not going to testify. That's not going to aid this Court in making a determination as to whether or not he made a mistake, or what he intended to do. It's not at that time, not at the time he did it. All right. So he's not going to be allowed to testify." (PHT 923)

Now the DA says the ruling was proper because an expert should not "invade the province of the finder of fact to decide a case. . . . Here the expert was to testify as to what the defendant's intent was at the time he shot the victim." (Opposition at 25)

Two responses are in order.

First, as the DA well knows, as a result of arguing for the admission of pro-prosecution expert testimony every day in criminal cases in this county, experts are in no way precluded from offering expert testimony on the ultimate issues in a criminal case. No case precludes such testimony, and Evidence Code §805 makes the contrary point expressly. Disturbingly, given the seriousness of this case and the importance of the taser expert to the defendant's position at the preliminary hearing, the very opinion the DA relies on in its opposition makes precisely that point *in the sentence preceding the portion quoted by the prosecution. People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 ("Otherwise admissible expert opinion testimony which embraces the ultimate issue to be decided by the trier of fact is admissible.") At the very least the DA owes this court an honest recitation of the relevant authorities.

Thus, very much contrary to the DA's assertion, there was no legal rule precluding the taser expert from reviewing the tapes and the testimony of the various witnesses and concluding that, in fact, Mehserle's use of his gun was accidental.

But far more important than the magistrate's misapprehension of the law were the two key factual errors, which, had it permitted the expert to take the stand, it would not have made. The DA suggests the expert's only role would have been to take the stand, tell the magistrate that Mehserle didn't intend to use his gun, and leave the courtroom.

But the record (which the DA fails to cite or discuss) makes perfectly obvious that the purpose of the witness was to educate the magistrate on four critical points: (a) that Mehserle's training was inadequate and that the short period of training, as well as the short time between the training and attempted use of the taser, made an accident highly probable; (b) that Mehserle's conduct on the night of the shooting—his statement that he was going to tase Grant, his insistence that Pirone back up, his own movement up and away from Grant, the unholstering method he employed, etc.—was entirely consistent with an attempt to tase and inconsistent with an intent to shoot; (c) that officers are trained to use *both hands* on the taser when they fire it; and (d) that under the training Mehserle received, as well as BART policy, officers are in no way precluded from carrying their tasers in a manner that would result in a strong hand draw.

As it happened, the expert's ultimate conclusion that Mehserle's use of his gun was accidental, although obviously admissible, was the least important element of the expert's testimony. As Mehserle has argued, and as the DA fails to discuss once in its brief, the magistrate's strong conclusion that Mehserle intended to pull his gun was based solely on two key factual mistakes, both of which could not and would not have occurred had it taken the hour or two to listen to the only person in the case who could offer any reliable insight into how officers use tasers.

Specifically, the magistrate (and even the DA in its opposition) believed Mehserle must have intended to fire the gun because he used a two-hand draw. The expert would have testified that such a view is wrong. And the magistrate believed Mehserle must have intended to fire the gun because he used a strong-hand draw. Again, the expert would have testified that the strong-hand draw offers no support whatsoever for the view that Mehserle did not intend to use his taser.

The magistrate's inexplicable ruling excluding the taser expert was error: the evidence was admissible and it provided key support for Mehserle's position that he never formed malice aforethought. And the magistrate's ruling was extraordinarily prejudicial: had the expert been

permitted to testify, the magistrate would not have made the two key factual errors that provide the lone support for his strongly-stated view that Mehserle intended to use his gun. Under the authorities previously cited, the error amounts to a violation of Mehserle's federal due process right to present a defense.

Dated: August 26, 2009

Respectfully submitted,

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By: Michael Rains
Attorney for Defendant
JOHANNES MEHSERLE

PROOF OF SERVICE

Case Name: *People v. Johannes Mehserle*
Superior Court of California County of Alameda; Case No.: 161210

I, Maggie Bedig, am a citizen of the United States, and am over 18 years of age. I am employed in Contra Costa County and am not a party to the above-entitled action. My business address is Rains Lucia Stern PC, 2300 Contra Costa Blvd., Suite 230, Pleasant Hill, California 94523.

DEFENDANT JOHANNES MEHSERLE'S REPLY TO THE DISTRICT ATTORNEY'S OPPOSITION TO DEFENDANT'S COMBINED MOTION PURSUANT TO PENAL CODE §995 AND NON-STATUTORY MOTION TO DISMISS

upon all parties addressed as follows and said service was effected as indicated below:

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Thomas J. Orloff, District Attorney
Michael O'Connor, Sr. Deputy District Attorney
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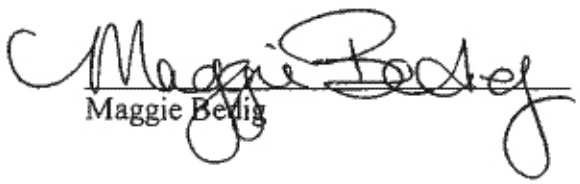
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on August 26, 2009 at Pleasant Hill, California.



Maggie Bedig